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Receivables Financing

Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade

Note by the Secretariat

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I. Introduction

1. The United Nations Commission on International Trade Law (UNCITRAL), at its twenty-eighth session, in 1995, decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing.[1] The Commission, at that session, had before it a report of the Secretary-General entitled: "Assignment in receivables financing: discussion and preliminary draft of uniform rules" (A/CN.9/412). It was agreed that the report, setting forth the concerns and the purposes underlying the project and the possible contents of the uniform law, would provide a useful basis for the deliberations of the Working Group.[2]

2. The Working Group commenced its work at its twenty-fourth session, in November 1995, by considering the report of the Secretary-General.[3] At its twenty-fifth to thirty-first sessions, the Working Group considered revised draft articles prepared by the Secretariat,[4] and, at its twenty-

[1] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

[2] Ibid., para. 379. At its twenty-sixth and twenty-seventh sessions, the Commission had considered two other reports of the Secretary-General (A/CN.9/378/Add.3 and A/CN.9/397). For the Commission's discussion of those reports, see ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-30.1 and Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214, respectively.

[3] The report of the Working Group is contained in document A/CN.9/420.

[4] The draft articles prepared by the Secretariat are contained in documents

ninth to thirty-first sessions, it adopted a draft Convention.[5] At its thirty-first session, the Working Group had before it a preliminary commentary on the draft Convention prepared by the Secretariat.[6] At that session, the Working Group agreed that the Secretariat should revise and submit the commentary to the Commission at its thirty-third session, to be held in New York from 12 June to 7 July 2000.[7] At that session, the Commission adopted articles 1 through 17 of the draft Convention and referred articles 18 through 44 of the draft Convention as well as articles 1 to 7 of the annex to the Working Group. The Commission requested the Working Group to proceed with its work expeditiously so that the draft Convention be submitted to the Commission at its thirty-fourth session, to be held in Vienna from 25 June to 13 July 2001.[8] The Commission also requested the Secretariat to prepare and submit to the Commission at its thirty-fourth session a revised version of the commentary.[9] The Working Group met in Vienna from 11 to 22 December 2000 and adopted articles 18 to 47 of the draft Convention and 1 to 9 of the annex to the draft Convention.[10]

3. The present note has been prepared pursuant to the request of the Commission. It is intended to provide a summary of the reasons for the adoption of a provision and its main objectives, along with explanations and interpretations of particular terms, without, however, giving a complete account of the *travaux préparatoires* or of all proposals and provisions that were not retained. For the benefit of those seeking fuller information on the history of a given provision, the commentary lists the references to the relevant portions of the reports of the sessions of the Working Group and the Commission.[11] The present note covers articles 1 through 17 of the draft Convention and is based on the consolidated text of the draft Convention as adopted by the Working Group at its last session, held in Vienna from 11 to 22 December 2000. The commentary on the remaining articles of the draft Convention will be issued in a subsequent document.

A/CN.9/WG.II/WP.87, A/CN.9/WG.II/WP.89, A/CN.9/WG.II/WP.93, A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98, A/CN.9/WG.II/WP.102 and A/CN.9/WG.II/WP.104. The reports of the Working Group are contained in documents A/CN.9/420, A/CN.9/432, A/CN.9/434, A/CN.9/445, A/CN.9/447, A/CN.9/455, A/CN.9/456 and A/CN.9/466.

5 A/CN.9/455, para. 17; A/CN.9/456, para. 18; and A/CN.9/466, para. 19.

6 A/CN.9/WG.II/WP.105 and A/CN.9/WG.II/WP.106.

7 A/CN.9/466, para. 215.

8 Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 A/55/17, paras. 186-188.

9 Ibid., paras. 190-191. The commentary that was before the Commission at its thirty-third session appears in document A/CN.9/470.

10 A/CN.9/486.

11 In order to avoid confusion, no special reference is made to previous article numbers, which, in the course of the preparation of the draft Convention, were altered several times. However, any earlier number will be apparent from the relevant discussion in the reports of the Working Group. Annex II to A/CN.9/486 contains an index to the final renumbering of articles.

II. Analytical commentary

A. Title and preamble

Draft Convention on Assignment of Receivables in International Trade

Preamble

The Contracting States,

Reaffirming their conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows:

References

A/CN.9/420, paras. 14-18; A/CN.9/434, paras. 14-16; A/CN.9/455, paras. 157-159; A/CN.9/445, paras. 120-124; A/CN.9/456, paras. 19-21 and 60-65; and A/55/17, paras. 181-183.

Commentary

Title

4. The draft Convention is intended to apply to a wide variety of assignment-related practices (for a brief description of the practices, see paras. 7-13; for a definition of the terms "assignment", "receivable", "assignor", "assignee" and "debtor", see article 2). The focus of the draft Convention is on financing practices. However, the title of the draft Convention contains no reference to financing. The reason is the need to avoid giving the impression that the scope of the draft Convention is limited to purely financing transactions and excludes important service transactions (e.g. assignments in international factoring transactions in which protection against debtor default, book-keeping or collection services are provided).

5. The reference to international trade is intended to reflect the overall objective of the draft Convention to facilitate the movement of goods and services across borders and appropriately clarify that the draft Convention applies to assignments with an international and commercial element. However, it is not intended to limit the scope of the draft Convention, for example,

only to assignments of receivables generated in international trade, excluding assignments of domestic receivables, or only to international assignments of domestic receivables, excluding domestic assignments of international receivables. In addition, the reference to international trade should not be interpreted as suggesting that the draft Convention may in no case affect domestic assignments of domestic receivables. Such assignments are affected by article 24, under which a conflict between a domestic and a foreign assignee of domestic receivables is referred to the law of the assignor's location (on this matter, see also paras. 21 and 22). They are also affected by article 1, paragraph 1 (b) under which the draft Convention may apply to a domestic assignment of a domestic receivable in a chain of assignments if a prior subsequent assignment falls within the ambit of the draft Convention. Furthermore, the reference to international trade is not intended to exclude assignments of consumer receivables (on this matter, see paras. 36, 103 and 132).

Preamble

6. The preamble is intended to serve as a statement of the general principles on which the draft Convention is based and which, under article 8, may be used in filling the gaps left in the draft Convention. These principles include: the facilitation of both commercial and consumer credit at more affordable rates, which is in the interest of all parties involved, assignors, assignees and debtors; the principle of debtor protection, according to which the debtor's legal position is not affected unless expressly stated otherwise in the draft Convention; the promotion of the movement of goods and services across borders; the enhancement of certainty and predictability as to the rights of parties involved in assignment-related transactions; the modernization and harmonization of domestic and international laws on assignment, both at the substantive and the private international law level; the facilitation of new practices and the avoidance of interference with current practices; and the avoidance of interference with competition.

Transactions covered

7. In view of the broad definition of the term "receivable" in article 2 (a) ("contractual right to payment of a monetary sum"), the draft Convention applies to a wide array of transactions. In particular, the draft Convention covers the assignment of trade receivables (arising from the supply of goods, construction or services between businesses), consumer receivables (arising from consumer transactions) and sovereign receivables (arising from transactions with a governmental authority or a public entity). With a view to clarifying the context of application of the draft Convention, those practices are described briefly in the following paragraphs. The list of practices covered by the draft Convention cannot be exhaustive, in particular in view of the rapid development of new practices.

8. First of all, included are traditional financing techniques relating to trade receivables, such as asset-based financing, factoring and forfaiting. Revolving credit facilities and purchase-money financing are the most common types of asset-based financing. Under a revolving loan facility, a lender makes loans from time to time at the request of its borrower. Such loans are secured by a security interest in all of the borrower's existing and future receivables or inventory (i.e. a revolving pool of goods that are bought, stored and sold on a regular basis) or both. They are generally used by the borrower to finance its ongoing working capital needs. The amount of loans available under this type of loan facility is based upon a specified percentage of the value of the collateral. This percentage (generally known as the "advance rate") is determined by the lender based upon the lender's estimate of the amount it would realize on the collateral if it were to look to it as a source for repayment of the loan. Typically, the advance rate ranges from 70% to 90% with respect to collateral consisting of receivables and 40% to 60% with respect collateral consisting of inventory. The revolving loan structure is, from an economic standpoint, highly efficient and generally considered to be beneficial to the borrower, since it is aimed at matching borrowings to the borrower's "cash conversion cycle" (i.e. acquiring inventory, selling inventory, creating receivables, receiving payments on the receivables and acquiring more inventory to begin the cycle again).

9. The term "purchase-money financing" refers to a financing arrangement under which a seller of goods or other property extends credit to its purchaser to enable the purchaser to acquire the property, or a creditor makes a credit or loan to the purchaser to enable the purchaser to acquire the property. In both cases, the seller or creditor will receive a security interest in the property to secure the credit or loan and in the resulting receivables. A common type of purchase-money financing is known as "floor-planning". Under a floor-planning facility, a creditor makes loans to finance the acquisition of a debtor's stock of inventory. This type of facility is often provided to debtors that are dealers in items, such as automobiles, trucks or other vehicles, computers and large consumer appliances. The creditors in these arrangements are often finance entities affiliated with the manufacturers. They normally take a security interest in the inventory and in any receivables resulting from the sale of inventory. Another common type of purchase-money financing is known as "purchase order financing". Under this type of facility, the creditor typically provides funds to finance the fulfillment by the debtor of specific purchase orders, which often includes the purchase by the debtor of the inventory required to complete the orders. The loan will be secured by the purchase orders, the purchased inventory and the resulting receivables. Among its other benefits to debtors, purchase-money financing serves a pro-competitive purpose in that it enables a debtor to choose different creditors to finance different components of the debtor's business in the most efficient and cost- effective way.

10. Factoring, in its most common form, is the outright sale of a large number of receivables with or without recourse to the assignor in the case of debtor default). Forfaiting, in its basic form, is the outright sale of single, large-value receivables, whether they incorporated in a negotiable instrument or not, without recourse. In these types of transactions, assignors assign to financiers their rights in receivables arising from the sale of the assignors' goods or services. The assignment in such transactions is normally an outright transfer but may also, for various reasons (e.g. stamp duty), be for security purposes. The purchase price is adjusted depending on the risk and the time involved in the collection of the underlying receivable. Beyond their traditional forms, those transactions appear in a number of variants tailored to meet the various needs of parties to international trade transactions. For example, in invoice discounting, there is an outright sale of a large number of receivables without debtor notification but with full recourse against the assignor in the case of debtor default. Inn maturity factoring, there is full administration of the sales ledger, collection from debtors and protection against bad debts, but without any financing. In international factoring, receivables are assigned to a factor in the assignor's country ("export factor") and then from the export factor to another factor in the debtor's country ("import factor"). The second assignment is made for collection purposes and the factors do not have recourse against the assignor in the case of debtor default (non-recourse factoring). All those transactions are covered in the draft Convention regardless of their form.

11. The draft Convention also covers innovative financing techniques, such as securitization and project financing on the basis of the future income flow of a project. In a securitization transaction, an assignor, creating receivables through its own efforts ("originator"), assigns, usually by way of an outright transfer, these receivables to an entity ("special purpose vehicle" or "SPV"). The SPV is fully owned by the assignor and specially created for the purpose of buying the receivables and paying their price with the money received from investors to whom the SPV sells the receivables or securities backed by the receivables. The segregation of the receivables from the originator's other assets allows the price paid by investors (or the money lent) to be linked to the financial strength of the receivables assigned and not to the creditworthiness of the assignor. It also insulates the receivables from the risk of the insolvency of the originator. Accordingly, the originator may be able to obtain more credit than would be warranted on the basis of its own credit rating. In addition, by gaining access to international securities markets, the originator may be able to obtain credit at a cost that would be lower than the average cost of commercial bank-based credit.

12. In large-scale, revenue-generating infrastructure projects, sponsors raise the initial capital costs by borrowing against the future revenue stream of the project. Thus, hydroelectric dams are financed on the security of the future income flow from electricity fees, telephone systems are paid for by the future revenues from telecommunications charges and highways are

constructed with funds raised through the assignment of future toll-road receipts. Given the draft Convention's applicability to future receivables, these types of project finance may be reduced to transfers, usually for purposes of security, of the future receivables to be generated by the project being financed. In this context, it should be emphasized that the draft Convention's exclusion of assignments made for personal, family or household purposes (see article 4, paragraph 1 (a)) will not act to exclude the assignment of consumer receivables.

13. Many other forms of transactions will be covered, including the refinancing of loans for the improvement of the capital-obligations ratio or for portfolio diversification purposes, loan syndication and participation and the assignment of an insurance company's contingent obligation to pay upon loss. Also covered are practices relating to the assignment of real estate or aircraft receivables and of receivables arising from certain financial transactions (e.g. receivables owed on the termination of all outstanding financial contracts governed by netting agreements; see article 4, paragraph 2 (b) and para. 47).

B. Chapter I

Scope of application

Commentary

Structure of chapter I

14. In chapter I, scope-related issues are dealt with in different provisions for the sake of clarity and simplicity in the text. Article 1 defines the substantive scope in general terms, as well as the territorial scope of application of the draft Convention. Articles 2 and 3 define the substantive scope in more detailed terms (definitions of assignment, receivable and internationality of an assignment or a receivable). Article 4 deals with excluded transactions. Article 5 (definitions and rules of interpretation) appears in chapter II of the draft Convention since the terms defined therein do not raise mainly scope-related issues.

Article 1
Scope of application

1. This Convention applies to:

(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State; and

(b) Subsequent assignments, provided that any prior assignment is governed by this Convention.

2. This Convention applies to subsequent assignments that satisfy the criteria set forth in paragraph 1 (a) of this article, even if it did not apply to any prior assignment of the same receivable.

3. This Convention does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State.

4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 and 2 of this article. However, those provisions do not apply if a State makes a declaration under article 39.

5. The provisions of the annex to this Convention apply as provided in article 42.

References

A/CN.9/420, paras. 19-32; A/CN.9/432, paras. 13-38; A/CN.9/434, paras. 17-41; A/CN.9/445, paras. 45-48 and 125-145; A/CN.9/447, paras. 143-146; A/CN.9/455, paras. 41-46 and 160-173; A/CN.9/456, paras. 22-37; A/CN.9/466, paras. 145-149; A/55/17, paras. 13-17; and A/CN.9/486, paras. 70-75.

Commentary

Substantive and territorial scope of application

15. Under article 1, the draft Convention applies to assignments of receivables (for a definition of the terms "assignment", "subsequent assignment", "receivable", "assignor", "assignee" and "debtor", see article 2). There are two conditions for the draft Convention to apply. There needs to be an element of internationality (for an exception, see article 1, paragraph 1 (b)) and an element of a territorial connection between certain parties and a Contracting State (for an exception, see article 1, paragraph 4). The element of internationality may relate to the assignment or to the receivable. Accordingly, the draft Convention applies to assignments of international receivables, whether or not the assignments are international or domestic, and to international assignments of receivables, even if the receivables are domestic (for comments on internationality, see paras. 38-41). The element of territorial connection may relate to the assignor only or to the assignor and the debtor as well. For the application of the provisions of the draft Convention other than the debtor-related provisions (e.g. chapter IV, section II), only the assignor needs to be located in a Contracting State. For the application of the draft Convention as a whole, the debtor too needs to be located in a Contracting State (or the law governing the receivable needs to be the law of a Contracting State; for a discussion of the term "location", see paras. 67-69).

16. This approach is based on the assumption that the main disputes that the draft Convention would be called upon to resolve would be addressed if the assignor (and, only for the application of the debtor-related provisions, the debtor too) is located in a Contracting State. This approach also takes into account that application of the provisions of the draft Convention other than those dealing with the rights and obligations of the debtor would not affect the debtor and, therefore, the debtor's location (or the law governing the original contract) should not matter for their application. It also takes into account that enforcement would normally be sought in the place of the assignor's or the debtor's location and there is thus no need to make reference to the assignee's location.

17. The territorial scope of application of the draft Convention is sufficiently broad and there is no need to extend it to cases in which no party may be located in a Contracting State but the law of a Contracting State is applicable by virtue of private international law rules. In addition, relying on private international law rules for the application of the draft Convention might introduce uncertainty. Private international law on assignment is not uniform and, in any case, parties would not know at the time of the conclusion of a transaction where a dispute might arise and, as a result, which private international law rules might apply. However, if the forum is located in a non-Contracting State, the courts are not bound by the draft Convention. Therefore, the courts of a non-Contracting State may not be precluded from applying, at least, the substantive law provisions of the draft Convention as part of the law designated by their private international law rules (if *renvoi* is prohibited under the law of the forum, the private international law rules of the draft Convention would not be applicable in such a case; for the meaning of *renvoi*, see para. 70).

18. Under article 1, paragraph 3, the debtor-related provisions of the draft Convention may apply to situations in which the debtor is not located in a Contracting State but the law of a Contracting State governs the contract from which the assigned receivable arises ("the original contract"; see article 5 (a)). In this context, a different approach to the territorial scope of application of the draft Convention is followed, since both the laws referred to would be known to the debtor. In line with article 1, paragraph 1, article 1, paragraph 3 provides that the debtor needs to be located in a Contracting State or the original contract needs to be governed by the

law of a Contracting State at the time of the conclusion of the original contract. This approach is followed so as to ensure predictability of the application of the draft Convention with respect to the debtor (the same approach is followed in article 40). However, as a result of this approach, in the case of future receivables assigned domestically, parties may not be able to determine (at least, before the future receivables arise) whether the draft Convention would apply to the rights and obligations of the debtor (for a related problem with regard to future receivables assigned domestically, see paras. 40 and 41).

Subsequent assignments

19. The draft Convention is designed to apply also to subsequent assignments. Such assignment may be made, for example, in the context of international factoring, securitization and refinancing transactions. The only condition for the application of the draft Convention is that a prior assignment is governed by the draft Convention. Accordingly, even a domestic assignment of domestic receivables may be brought into the ambit of the draft Convention if it is subsequent to an international assignment. The reason for such an approach is that, unless all assignments in a chain of assignments are made subject to one and the same legal regime, it would be very difficult to address assignment-related issues in a consistent manner (*continuatio juris*).

20. The draft Convention is also intended to apply to subsequent assignments that in themselves fall under article 1, paragraph 1 (a), whether or not any prior assignment is governed by the draft Convention. As a result, the draft Convention may apply only to some of the assignments in a chain of assignments. This approach is a departure from the principle of *continuatio juris*. However, it is followed so as to ensure that parties to assignments in securitization transactions, in which the first assignment is a domestic one and relates to domestic receivables, are not deprived of the benefits that may be derived from the application of the draft Convention. This approach is based on the assumption that it would not unduly interfere with domestic practices (on this matter, see paras. 21 and 22).

Relationship with national law

21. As a result of the fact that the draft Convention covers international assignments of domestic receivables or even domestic assignments of domestic receivables made in the context of subsequent assignments, business parties in domestic transactions could benefit from increased access to international financial markets and thus to potentially lower-cost credit. The interests of assignors protected, for example, by national law prohibitions of assignments of future receivables or of global assignments, would not be unduly interfered with (see para. 94. The draft Convention does not preclude the assignor from offering its receivables to different lenders for credit (e.g. to a supplier of materials on credit and to a financing institution for working capital) in that it does not give priority to one lender over the other. The interests of debtors, protected by national legislation, would not be unduly interfered with either. The draft Convention requires that the debtor be located in a Contracting State (or that the law governing the original contract is the law of a Contracting State) and limits the effects of an assignment on the debtor to those specified in articles 19-23.

22. The interests of domestic assignees would not be unduly interfered with either, because the draft Convention does not give priority to a foreign over a domestic assignee. It merely specifies which national law would govern priority (see articles 24 and 5 (m)). In addition, a conflict between a domestic and a foreign assignee of domestic receivables is not covered by the draft Convention, unless the assignor is located in a Contracting State (see article 1, paragraph 1 (a)). That State, by definition in a domestic assignment of a domestic receivable, would be the State in which both the domestic debtor and the domestic assignee would be located (see article 3). However, in the case of a conflict between an assignment by a branch office and a duplicate assignment of the same receivables by the head office, different laws may apply. This may occur if the branch or the head office is located in a non-Contracting State in which the conflict is referred to the law of the branch office's location, while under the draft Convention reference would be made to the law of the head office's location (see article 5 (h)).

Scope of chapter V

23. Under article 1, paragraph 4, chapter V applies to assignments with an international element as defined in article 3, whether or not there is a territorial connection between an assignment and a Contracting State. The scope of application of chapter V is limited to international transactions as defined in article 3. In order to reduce any conflicts with other conventions, dealing with private international law issues of assignment,[12] article 1, paragraph 4 allows States to opt out of chapter V. On the other hand, the scope of chapter V is extended beyond the scope of the other provisions of the draft Convention, since chapter V applies irrespective of any territorial connection with a Contracting State. As a result, chapter V may perform a double function. It may supplement the other provisions of the draft Convention or provide a second layer of harmonization, a so called mini-convention along the lines of chapter VI of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).

Application of the annex

24. Article 24 of the draft Convention refers priority issues to the law of the assignor's location (as to the meaning of "location", see article 5 (h)). In recognition of the fact that some States may need to modernize or adjust their priority rules, article 1, paragraph 5 allows States to opt into one of the substantive law priority rules set forth in the annex. Article 42 clarifies the effect of a declaration made under article 1, paragraph 5.

Article 2
Assignment of receivables

For the purposes of this Convention:

(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of, or an undivided interest in, the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

References

A/CN.9/420, paras. 33-44; A/CN.9/432, paras. 39-69 and 257; A/CN.9/434, paras. 62-77; A/CN.9/445, paras. 146-153; A/CN.9/456, paras. 38-43; A/CN.9/466, paras. 87-91; and A/55/17, paras. 18-24.

Commentary

Assignment and contract of assignment or financing contract

25. Like most legal systems, the draft Convention recognizes the distinction between the assignment itself as a transfer of property and the contract of assignment as a transaction creating personal obligations (in other words, between the assignment and its *causa*, that is, a sale, security agreement, gift or payment). However, the draft Convention does not deal with the relationship between the assignment and the contract of assignment. In particular, the draft Convention does not address the question whether the effectiveness of an assignment depends on

[12] For example, the European Union Convention on the Law Applicable to Contractual Obligations, Rome, 1980 ("the Rome Convention") and the Inter-American Convention on the Law Applicable to International Contracts, Mexico City, 1994 ("the Mexico City Convention").

the validity of the contract, which is treated differently from one legal system to another. In addition, the draft Convention does not refer to the purpose of an assignment, that is whether an assignment is made for purely financing purposes or for bookkeeping, collection, protection against debtor default, risk-management, portfolio diversification or other purposes. A reference to the "financing" purpose of a transaction could create a special regime on assignments for financing purposes, even though one is not needed. Such a reference could also result in unnecessarily excluding from the scope of the draft Convention important transactions in which services but no financing may be provided. Furthermore, the "commercial" purpose of the transaction could create uncertainty, since a uniform definition of the term in a convention is neither feasible nor desirable.

Contractual issues

26. The draft Convention does not address contractual issues other than those dealt with in articles 13 to 16 and 29. For example, whether "value, credit or services" (i.e. consideration) is given or promised at the time of the assignment or at an earlier time is not mentioned in article 2 or elsewhere in the draft Convention, since it is a matter for the contract of assignment or the financing contract. As a result, the draft Convention would apply to both assignments for value and to gratuitous assignments.

"Transfer by agreement"

27. With the intention of bringing within the ambit of the draft Convention, in addition to assignments, other practices involving the transfer of property rights in receivables, such as contractual subrogation or pledge, article 2 defines "assignment" as a transfer. This approach takes into account the fact that significant receivables financing transactions, such as factoring, take place, in some legal systems, by way of a contractual subrogation or pledge. Rather than creating a new type of assignment, the draft Convention is aimed at providing uniform rules on assignment and assignment-related practices with an international element. Although covered in theory by currently existing national law, such practices cannot be sufficiently developed in view of the inherent limitations on the application of national law in an international context posed by mandatory rules and public policy considerations of the forum. The reference to transfers "by agreement" is intended to exclude transfers by operation of law (e.g. statutory subrogation) and unilateral assignments (i.e. where there is no agreement of the assignee, whether explicit or implicit).

28. Both outright transfers, including those made for security purposes, and assignments by way of security are covered. In order to avoid any ambiguity as to that matter, article 2 (a) covers it explicitly and creates the legal fiction that, for the purposes of the draft Convention, the creation of security rights in receivables is deemed to be a transfer. However, the draft Convention does not define outright assignments and assignments by way of security. In view of the wide divergences existing among legal systems as to the classification of assignments, this matter is left to other law applicable outside the draft Convention. In fact, an assignment by way of security could possess attributes of an outright transfer, while an outright transfer might be used as a security device.

National form and opting-in

29. There is no condition for the application of the draft Convention other than the conditions described in chapter I. In particular, there is no requirement for the assignment to be in a certain form for the draft Convention to apply. In fact, article 8 refers form to law applicable outside the draft Convention. In addition, there is no need for the parties to the assignment to indicate in any way their will to submit their assignment to the draft Convention. If parties located in a Contracting State opt into the draft Convention anyway, in line with article 6, their agreement should not affect the rights of the debtor and other third parties. If parties are located in a non-Contracting State, the law applicable to the choice of law by the parties would determine its effects.

"From one person to another person"

30. Both the assignor and the assignee can be legal entities or individuals, whether merchants or consumers. In particular, the assignment between individuals is covered, unless the assignee is a consumer and the assignment is made for his or her own consumer purposes (article 4, paragraph 1 (a)). As a result, the assignment of credit card receivables or of loans secured by real estate in securitization transactions or of toll-road receipts in project financing arrangements falls within the ambit of the draft Convention. In view of the Commission's understanding that the singular includes the plural and vice versa, an assignment made by many persons (e.g. joint owners of receivables) or to many persons (e.g. a syndicate of financiers) is also covered (so is the assignment of more than one receivable). In the determination, however, of the territorial scope of application or internationality, each assignment is to be considered as a separate assignment and to meet the conditions of chapter I for the draft Convention to apply (as to cases involving multiple debtors, see para. 37). In an assignment to an agent acting on behalf of several persons, whether there is one assignee or more depends on the exact authority of the agent, which is a matter left to law applicable outside the draft Convention. If the agent acts as a mere intermediary, accepting and forwarding correspondence to the persons it represents for instructions, and then forwarding the instructions, an assignment to several persons, on whose behalf the assignee is acting, may be involved. If the agent has the authority to make decisions on behalf of the persons represented, an assignment to one person may be involved.

"Contractual right to payment of a monetary sum"

31. The draft Convention applies to the assignment of receivables arising from any type of contract, in the broadest sense of the term, whether the contract exists at the time of the assignment or not. What is a "contractual" right is a matter of interpretation in accordance with the law governing that right. However, contractual receivables covered include receivables arising under contracts for the supply of goods, construction or services. The assignment of such receivables is covered whether the relevant original contracts are commercial or consumer transactions. For example, toll road receipts are contractual receivables, since the person using the toll road accepts implicitly the offer made implicitly by the public or private entity operating the toll road. The assignment of receivables in the form of royalties arising from the licensing of intellectual property is also covered. So is the assignment of damages for breach of contract and of interest (if it was owed under the original contract) or of dividends (arising from shares, whether they were declared at, or arose after, the time of the assignment). However, the assignment of receivables from derivatives, letters of credit or deposit accounts is excluded (see article 4). On the other hand, the transfer of receivables arising by operation of law, such as tort receivables, receivables arising in the context of unjust enrichment, tax receivables or receivables determined in court judgements or arbitral awards, are excluded, unless they are incorporated in a settlement agreement.

32. In principle, the right of the seller (assignor) to any returned goods (e.g. because they are defective) is not a receivable. It is, however, treated as a receivable in the relationship between the assignor and the assignee if it takes the place of the assigned receivable (see articles 5 (j) and 16). Furthermore, non-monetary rights convertible into a monetary sum are receivables the assignment of which is covered. If the conversion is foreseen in the original contract, this result is implicit in article 2. If such a conversion is not foreseen in the original contract, it is in line with the decision to cover the assignment of non-monetary rights converted into damages for breach of contract.

Non-monetary performance rights

33. The assignment of other, non-monetary, contractual rights (e.g. the right to performance, the right to declare the contract avoided) is not covered. To the extent that assignees would rely not on the receivables but on such non-monetary performance rights, the assignment of such rights either does not form part of significant transactions or may be prohibited where the right to performance is a personal right. The assignment of contracts, which involves an assignment of contractual rights and a delegation of obligations, is not covered either. While such transactions may form part of financial arrangements, the financier would normally rely mainly

on the receivables. As to the delegation of obligations, it is not covered because it raises issues going far beyond the desirable scope of the draft Convention.

Parts or undivided interests in receivables

34. Important practices covered by the draft Convention involve the assignment of parts or undivided interests in receivables (e.g. securitization, loan syndication and participation). The effectiveness of partial assignments is not recognized in all legal systems. Article 9, therefore, validates such assignments. In addition, in order to avoid any uncertainty as to whether the draft Convention as a whole applies to them article 2 contains an explicit reference to such assignments. This result is particularly useful with respect to the application of the debtor-protection provisions to cases where the receivable may be partially assigned to several assignees (as to the debtor's discharge in the case of a notification of a partial assignment, see article 19, paragraph 6).

Personal rights (statutory assignability)

35. The draft Convention treats the question of the assignment of personal rights (e.g. wages, pensions or insurance policies) and of rights the assignment of which is prohibited by law (e.g. sovereign receivables) as one of effectiveness not of scope. Accordingly, article 2 does not exclude the assignment of personal rights (involved, for example, in significant financing practices, such as the financing of temporary employment services). If such assignments are not prohibited under national law, the draft Convention recognizes their effectiveness. If, however, such assignments are prohibited under national law, the draft Convention does not affect that prohibition (see article 9, paragraph 3).

"[Owed by] a third person" (merchant, consumer, State or other public entity)

36. Apart from the assignor and the assignee, the debtor too could be a legal entity or an individual, a merchant or a consumer, a governmental authority or a financial institution. Unlike the Unidroit Convention on International Factoring ("the Ottawa Convention"), the draft Convention does not exclude commercial practices involving the assignment of contractual receivables owed by consumers, unless the assignment is to a consumer for his or her consumer purposes (see article 4, paragraph 1 (a)). Assignments of consumer receivables form part of significant practices, such as securitization of credit card receivables, the facilitation of which has the potential to increase access to lower-cost credit by manufacturers, retailers and consumers and, as a result, could facilitate international trade in consumer goods. However, while covering the assignment of consumer receivables, the draft Convention is not intended to override consumer-protection law (see paras. 103 and 132).

37. The assignment of receivables owed by a Government or a public entity is also covered, unless their assignment is prohibited by law (see article 9, paragraph 3). However, the State in which the sovereign debtor is located may enter a reservation as to the rule of article 11 according to which assignments are effective notwithstanding a contractual limitation on assignment (see article 40). Receivables owed by debtors in financial contracts, such as loans, deposit accounts, swaps and derivatives, are not covered by the draft Convention (see article 4 and paras. 47-54). Furthermore, the assignment of one or more than one receivable, whether in whole or in part, owed jointly (i.e. fully) and severally (i.e. independently) by multiple debtors is also covered, provided that the original contract is governed by the law of a Contracting State. Otherwise, in cases where one or more, but not all, debtors are located in a Contracting State, each transaction should be viewed as an independent transaction so as to ensure predictability with regard to the debtor's legal position.

Article 3
Internationality

A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee

are located in different States.

References

A/CN.9/420, paras. 26-29; A/CN.9/432, paras. 19-25; A/CN.9/445, paras. 154-167; A/CN.9/456, paras. 44, 45, 227 and 228; A/CN.9/466, paras. 92 and 93; and A/55/17, paras. 25-26.

Commentary

38. With a view to achieving certainty in the application of the draft Convention, article 3, following the example of other texts prepared by the Commission or other organizations, defines internationality by reference to the location of the parties (as to the meaning of "location", see article 5 (h)). In the case of more than one assignor, assignee or debtor, internationality is to be determined for each of those parties separately (see paras. 30 and 37). As a result of article 3, once a receivable is international, its assignment is covered by the draft Convention, whether the receivable is assigned to a domestic or to a foreign assignee. On the other hand, even if a receivable is domestic, its assignment may come within the ambit of the draft Convention if it is international or it is part of a chain of assignments that includes an earlier international assignment (see paras. 19 and 20).

39. The international character of an assignment is determined at the time it is made, while internationality of a receivable is determined at the time of the conclusion of the original contract ("at the time it arises"). A change in the location of the parties after the relevant time does not make an international assignment or receivable domestic and vice versa. Determining the internationality of a receivable at the time it arises is justified by the need for a potential assignor or a debtor to know at the time of the conclusion of the original contract which law might apply to a potential assignment. Such knowledge is important for the determination of the availability of the cost of credit to the assignor and, consequently, to the debtor.

40. As a result, however, in the case of a domestic bulk assignment of domestic and international future receivables, the parties may not be able to determine at the time of the assignment whether the draft Convention will apply to the portion of the assignment that relates to international receivables. This means that, depending on whether the draft Convention applies, implied representations as between the assignor and the assignee, as well as the legal position of the debtor may be different. However, the applicable priority rules would not be different, since the draft Convention would cover in any case all possible conflicts of priority, including conflicts with a domestic assignee of domestic receivables.

41. Parties to a domestic bulk assignment of domestic and international future receivables, will, therefore, need to structure their transactions in a certain way to avoid this problem (e.g. by avoiding the assignment of both domestic and international future receivables in one transaction). Where parties are not able to do so, they will be exposed to the possibility that one law may apply to domestic receivables while another law, the draft Convention, would apply to international receivables. This problem, however, is not created by the draft Convention; it exists already outside the draft Convention in cases where domestic and international receivables are assigned. In addition, the draft Convention makes it easier for parties to address this problem at least, to the extent that parties to a domestic assignment will be faced with only two laws (i.e. the law of the country, in which the assignor and the assignee are located, and the draft Convention).

Article 4
Exclusions

1. This Convention does not apply to assignments made:

(a) To an individual for his or her personal, family or household

purposes;

(b) By the delivery of a negotiable instrument, with an endorsement, if necessary;

(c) As part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:

(a) Transactions on a regulated exchange;

(b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(c) Bank deposits;

(d) Inter-bank payment systems, inter-bank payment agreements or investment securities settlement systems;

(e) A letter of credit or independent guarantee;

(f) The sale, loan or holding of, or agreement to repurchase, investment securities.

3. This Convention does not:

(a) Affect whether a property right in real estate confers a right in a receivable related to that real estate or determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable;

(b) Make lawful the acquisition of property rights in real estate not permitted under the law of the State where the real estate is situated.

[4. This Convention does not apply to assignments listed in a declaration made under article 41 by the State in which the assignor is located, or with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, by the State in which the debtor is located or the State whose law is the law governing the original contract.]

References

A/CN.9/432, paras. 18, 47-52, 106 and 234-238; A/CN.9/434, paras. 42-61; A/CN.9/445, paras. 168-179; A/CN.9/456, paras. 46-52; A/CN.9/466, paras. 54-77, 78-86 and 192-195; and A/55/17, paras. 27-109 and 152.

Commentary

42. In view of the broad scope of application of the draft Convention, article 4 is intended to exclude certain practices that are either distinct from assignment-related practices or are already sufficiently regulated.

Assignments for consumer purposes

43. Paragraph 1 (a) excludes from the scope of the draft Convention assignments of trade or consumer receivables from a business entity or a consumer to a consumer but only if they are made for the assignee's personal, family or household purposes. Such assignments are of no practical significance. Accordingly, assignments of receivables arising from consumer

transactions are not excluded, unless such assignments are made to a consumer for his or her consumer purposes.

Assignments of negotiable instruments

44. In order to avoid any interference with the rights of persons derived from negotiable instrument law (i.e. the holder of the instrument and the debtor under the instrument), paragraph 1 (b) excludes transfers of negotiable instruments (i.e. bills of exchange, promissory notes, cheques and bearer documents). The main reason for this approach is that negotiable instrument law is a distinct body of law that treats certain key issues in a way other than the way in which they are addressed in the draft Convention. For example, under negotiable instrument law, if the debtor pays a transferee of the instrument who is not the rightful holder, the debtor is still liable to the holder. Similarly, a person who takes the instrument for value and without knowledge of any hidden defences against the transferor is not subject to those defences.

45. In view of the policy underlying paragraph 1 (b), the focus is on the negotiation of an instrument (i.e. delivery with an endorsement if such endorsement is necessary). As a result, transfers of instruments to the order of the holder by delivery and endorsement and transfers of bearer documents by delivery are excluded. However, transfers of instruments to the order by mere delivery without a necessary endorsement are not excluded. In addition, if a receivable exists both under the contract and in the form of a negotiable instrument, the assignment of the receivable is not excluded. Receivables arising under a contract are often incorporated into a negotiable instrument for the sole purpose of obtaining payment by way of summary proceedings in court, if necessary.

Assignments of receivables in corporate buyouts

46. Paragraph 1 (c) excludes assignments made in the context of the sale of a business as a going concern, if they are made from the seller to the buyer. Such assignments are excluded since they are normally regulated differently by national laws dealing with corporate buyouts. However, assignments made to an institution financing the sale (or between two or more entities for the purpose of debt restructuring or refinancing) are not excluded.

Assignments of "financial" receivables

47. Paragraph 2 excludes a number of practices for which the draft Convention (e.g. the provisions on representations, contractual limitations on assignment, set-off and priority) would not be well suited. Unlike the practices in articles 11, paragraph 3 and 12, paragraph 3 with respect to which the application of articles 11 and 12 only is excluded, practices are excluded in article 4, paragraph 2 from the scope of the draft Convention as a whole. The difference in the approach lies in the fact that the draft Convention would never apply to practices listed in article 4, paragraph 2, while the application of the draft Convention with respect to practices listed in articles 11, paragraph 3 and 12, paragraph 3 would depend on the existence of an anti-assignment agreement and on the effect given to such an agreement by the law governing it.

48. The criterion for the exclusion in subparagraph (a) is not the type of the asset being traded but the method of settlement used. In addition, not every regulated trading is excluded but trading under the auspices of a regulated exchange (e.g. stock exchange, securities and commodities exchange, foreign currency and precious metal exchange). As a result, the trading of securities, commodities, foreign currency or precious metals outside a regulated exchange (and outside netting arrangements excluded in subparagraph (b)) is not excluded (e.g., the factoring of proceeds from the sale of gold or other precious metals).

49. Subparagraph (b) excludes "financial contracts" governed by netting agreements (for comments on the relevant definitions, see paras. 72-75). In such financial transactions, it is inherent that any party may be debtor or creditor and, by definition, payments net against each other. As a result, if one payment is pulled out by way of an assignment, the credit risk situation on the basis of which a party entered into the transaction may change. A change in the risk exposure of a party could unravel the whole transaction or have a negative impact on the cost of credit, a result which would run counter to the overall objective of the draft Convention. In view

of the importance of such transactions for international financial markets and their volume, such a situation may create a systemic risk that may affect the financial system as a whole.

50. Practices governed by netting arrangements between two commercial enterprises other than financing institutions ("industrial netting") are not excluded. There is nothing in the draft Convention that would interfere with such practices. In addition, their exclusion could inadvertently result in excluding significant commercial transactions on the mere ground that the assignor had a netting arrangement with the debtor. The assignment of a receivable payable upon termination ("close-out") of a netting arrangement is not excluded either, since, in the case of such an assignment, there is no risk of upsetting the mutuality of obligations (see also articles 11, paragraph 3 (d) and 12, paragraph 4 (d)).

51. In subparagraph (c), receivables arising from deposit accounts are excluded. The reason is that certain provisions of the draft Convention (e.g. articles 5 (h), 11, 12, 19, 20 and 24) may upset the normal relationship between a financing institution and an account holder, and interfere with the extension of credit on the security of a pledge of the account.

52. The underlying reason for the exclusion in subparagraph (d) is the need to avoid interfering with the regulation of inter-bank payment systems (more than two parties) or agreements (two parties) and securities settlement systems (that normally involve more than two parties but may, in some countries, involve only two parties). Such systems are excluded in subparagraph (d) (and not in subparagraph (b)), since they operate within or outside netting agreements.

53. Assignments of receivables arising under a letter of credit or an independent guarantee are also excluded (see subparagraph (e)). Such assignments give rise to special considerations and are regulated by special legislative and non-legislative texts, including the United Nations Convention on Independent Guarantees and Standby Letters of Credit, the Uniform Customs and Practice for Documentary Credits (UCP500), the Uniform Rules for Demand Guarantees (URDG) and the Uniform Rules on Standby Practices (ISP98).

54. Subparagraph (f) is intended to address transactions with respect to investment securities that take place outside a regulated exchange (see subparagraph (a)) or a netting agreement (subparagraph (b)). The direct (by the owner) or indirect (by an intermediary) holding of paper or dematerialized securities is excluded, since it may generate receivables, such as the balance in a securities account or dividends from securities. Subparagraph (f) is also intended to exclude transactions made by physical delivery or by an entry into the books of an intermediary holding paper or dematerialized securities.

Assignments of real estate receivables

55. The main purpose of paragraph 3 is to ensure that the draft Convention does not disrupt national real estate markets. Subparagraph (a) is aimed at ensuring that the draft Convention would not apply to a conflict of priority between the holder of a right in real estate and the assignee of receivables arising from the sale or lease of, or secured by, real estate. Such a conflict may arise if a right in real estate is extended to receivables related to the real estate. For example, it is normal for a financier of a real estate acquisition or of a construction or an improvement of buildings to obtain a mortgage that gives the financier a right in future income derived from the real estate or from the buildings. The priority of the rights of such a financier is normally subject to the law of the country in which the real estate is located. However, if the right of the financier in the receivables is not derived from the right in real estate, the assignment of the receivables is not excluded. Otherwise, the mere existence of a mortgage could inadvertently result in excluding from the scope of the draft Convention significant receivables financing practices that are currently regulated appropriately by national assignment of receivables law.

56. Subparagraph (b) is intended to ensure that the draft Convention does not affect any statutory prohibitions existing with respect to the acquisition of rights in real estate by an assignee of receivables related to the real estate. As a result, if payment of the assigned receivable is secured by a mortgage, despite article 12, the assignee would not obtain that

mortgage if that mortgage was not transferable by law. Furthermore, subparagraph (b) is intended to supplement the protection afforded to holders of rights in real estate receivables in articles 9, paragraph 3 (statutory prohibitions), 12, paragraph 5 (form requirements) and 25, paragraph 1 (public policy).

Exclusions by declaration

57. In the interest of enhancing the acceptability of the draft Convention, paragraph 4, which appears within square brackets since it has not been adopted yet, gives States the option to exclude further practices, whether existing or future.

C. Chapter II
General provisions

Article 5
Definitions and rules of interpretation

For the purposes of this Convention:

(a) "Original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) "Existing receivable" means a receivable that arises upon or before the conclusion of the contract of assignment and "future receivable" means a receivable that arises after the conclusion of the contract of assignment;

(c) "Writing" means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;

(d) "Notification of the assignment" means a communication in writing that reasonably identifies the assigned receivables and the assignee;

(e) "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;

(f) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(g) "Priority" means the right of a party in preference to another party;

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

(i) "Law" means the law in force in a State other than its rules of private international law;

(j) "Proceeds" means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

(k) "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

(l) "Netting agreement" means an agreement that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (l) (ii) of this article under two or more netting agreements;

(m) "Competing claimant" means:

(i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;

(ii) A creditor of the assignor; or

(iii) The insolvency administrator.

References

A/CN.9/420, paras. 52-60; A/CN.9/432, paras. 70-72, 94-105; A/CN.9/434, paras. 78-85, 109-114, 167 and 244; A/CN.9/445, paras. 180-190; A/CN.9/456, paras. 53-78; A/CN.9/466, paras. 25-31, 46-49 and 94-100; A/55/17, paras. 110-118 and 184; and A/CN.9/486, paras. 47, 54, 147 and 173.

Commentary

Original contract

58. The original contract, which is used as a point of reference in articles 5 (h), 17, 18, paragraph 1, 19, paragraph 1, 20, paragraph 1, 22, paragraph 2 (b) and 23, is the source of the assigned receivable. With the exception of those provisions that expressly state otherwise (e.g. articles 9-12 and 17-23), the draft Convention is not intended to affect the rights and obligations of the parties under the original contract.

Existing and future receivable

59. The terms "existing" and "future" receivable are referred to in articles 9 and 10 (it is understood that the singular includes the plural and vice versa). The distinction between an existing and a future receivable is based on the time of the conclusion of the original contract. A receivable arising under a contract, which has been concluded before or at the time of assignment, is considered to be an existing receivable, even though it does not become due until

a future date or is dependent upon counter-performance or some other future event. The definition covers the entire range of future receivables. It covers, in particular, conditional receivables (that might arise subject to a future event) and purely hypothetical receivables (that might arise from a future activity of the assignor; for a limitation introduced in article 9, see para. 83). While it is generally assumed that "conclusion of the contract" refers to the time when the parties reach a legally binding agreement and does not presuppose the performance of the contract, the exact meaning of this term is left to law applicable outside the draft Convention.

Writing

60. The term is referred to in articles 5 (d), 19, paragraphs 2 and 7, 21, paragraphs 1 and 3, 43, paragraphs 2 and 4, 46, paragraph 1 of the draft Convention and in article 5, paragraph 1 of the annex. Its definition includes other than paper-based means of communications that can perform the same functions as a paper communication (e.g. provide tangible evidence, serve as a warning to the parties with regard to the consequences or provide a legible communication, authentication and sufficient assurances as to its integrity). It is inspired by articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce and reflects the two distinct notions of "writing" and "signature" (for the meaning of the terms "accessible", "usable" and "subsequent reference", see the Guide to Enactment of the Model Law, para. 50).

61. It is assumed that the need for higher assurances as to the authenticity of communications should be assessed differently depending on the context in which the communication is made. Accordingly, the draft Convention requires a writing for the notification of the assignment (see article 5 (d)) and a writing signed by the debtor for the waiver of the debtor's defences (see article 21, paragraph 1). Writing is also required for declarations by States and for certain registration-related acts (see article 43, paragraphs 2 and 4 of the draft Convention and article 5, paragraph 1 of the annex).

Notification of the assignment

62. The term is used in articles 15, 16, 18, 19, 20, paragraph 2 and 22. A notification meets the requirements of the draft Convention if it is in writing and reasonably identifies the assigned receivables and the assignee (and it is in a language that is reasonably expected to inform the debtor, see article 18, paragraph 1). If a notification does not meet those requirements, it is not effective under the draft Convention. However, the question whether such a notification is effective under law applicable outside the draft Convention is subject to that law (as to the discharge of the debtor by payment to the person entitled to payment even under law applicable outside the draft Convention, see article 19, paragraph 8).

63. What is a reasonable description in each particular case is a matter to be determined in view of the circumstances. In general, it would not be necessary to state whether an outright assignment or an assignment by way of security is involved or to specifically identify the debtor or the amount. A general identification along the lines "all my receivables from my car business to X" or "all my receivables as against my clients in countries A, B and C to Y" would be reasonable. However, in the case of a partial assignment, the amount assigned may need to be specified in the notification (on partial assignments, see paras. 34 and 89; see also article 19, paragraph 6).

64. While the notification must reasonably identify the assignee for it to be an effective notification under the draft Convention, it does not need to identify the payee (i.e. the person to whom or for whose account or the address to which the debtor is to pay). Accordingly, a notification containing no payment instruction is effective under the draft Convention (see articles 15, paragraph 1, 18, paragraph 1 and 19, paragraph 2; see also para. 124 and comments on article 19, paragraph 2).

Insolvency administrator and insolvency proceeding

65. The term "insolvency administrator" is used in articles 24 of the draft Convention and articles 2, 7 and 9 of the annex. The term "insolvency proceeding" is used in article 25 of the draft Convention and articles 2, 7 and 9 of the annex. Their definitions have been inspired by

the definitions of "foreign proceeding" and "foreign administrator" contained in article 2 (a) and (d) of the UNCITRAL Model Law on Cross-Border Insolvency. They are also consistent with article 1, paragraph 1 and article 2 (a) and (b) of the European Union Regulation on Insolvency Proceedings. By referring to the purpose of a proceeding or to the function of a person, rather than using technical expressions that may have different meanings in different legal systems, the definitions are sufficiently broad to encompass a wide range of insolvency proceedings, including interim proceedings. This approach is intended to ensure that a Contracting State would not need to recognize a proceeding that is not an insolvency proceeding under the law of that State. It is also intended to ensure that a Contracting State would not deny recognition to a proceeding that is an insolvency proceeding under the law of that State.

Priority

66. The term "priority" is used in articles 16, 24, 25, paragraph 2, 26, 27, 31 and 43, paragraph 7, 45, paragraph 4 and 46, paragraph 4 of the draft Convention, as well as in articles 1, 2 and 6 to 9 of the annex. Priority under the draft Convention means that a party may satisfy its claim in preference to other claimants. No reference is made to payment, since the receivable may be satisfied by payment or in some other way (e.g. return of goods). Priority does not mean validity. It presupposes an assignment that is valid as between the assignor and the assignee (for the reasons why use of the term "effective" is preferred in article 9, see para. 85). Whether a claimant has a proprietary (*in rem*) rather than a personal (*ad personam*) right and whether an assignment is an outright assignment or an assignment by way of security are matters treated as being distinct from priority ("the characteristics of a right"; see article 24). Like priority, though, they are left, to the law of the assignor's location. Priority is a matter distinct from the discharge of the debtor as well. Under article 19, the debtor is discharged, even if payment is made to an assignee who does not have priority. Whether that assignee will retain the proceeds of payment is a matter of priority in proceeds to be resolved among the various claimants in accordance with the law governing priority (see article 24).

Location

67. This term is referred to in several provisions of the draft Convention (i.e. articles 1, paragraphs 1 (a) and 3, 3, 4, paragraph 4, 17, paragraph 2, 21, paragraph 1, 23 to 25, 31, 36, paragraph 3, 38, 40 and 41). The two main issues, however, in which the term "location" is referred to, are the scope of application and questions of priority. The definition is intended to strike a balance between flexibility and certainty. The place of business is a well-known term, widely used in UNCITRAL and other international legislative texts, and on which abundant case law exists. It is used to denote a place in which the professional activities of a person or an entity are conducted. For the purpose of the application of the law of a State, several places of business in one and the same State are considered to be one place of business. In order to ensure a sufficient degree of predictability of the application of the draft Convention with regard to the debtor, in the case of multiple places of business of the debtor, reference is made to the place with the closest connection to the original contract. If the assignor (or the assignee) has more than one place of business, "place of business" means the place of central administration. This rule is designed to ensure that priority issues are referred to a single jurisdiction and one in which any main insolvency proceeding is most likely to be opened.

68. Place of central administration is akin to the centre of main interests (a term used in the UNCITRAL Model Law on Cross-Border Insolvency), chief executive office or principal place of business. All those terms are understood as denoting the centre of management and control, the real business centre, from which in fact, not as a matter of form, the important activities of an entity are controlled and ultimate decisions at the highest level are actually made. In this regard, the place where most assets are located or books and records are kept is irrelevant. To the extent that the day-to-day management of the affairs and operations of an entity is conducted from a place other than the place of central administration, the place of central administration remains decisive. However, unlike the UNCITRAL Model Law, in which a rebuttable presumption is established that the centre of main interests is the place of registration (article 16, paragraph 3), the draft Convention does not introduce such a "safe harbour" rule. Unlike the UNCITRAL Model Law whose main focus is on insolvency, the draft Convention focuses mainly on the

advance planning in the financing of a solvent debtor and for that planning to be facilitated it is absolutely necessary to define location by reference to a single and easily determinable jurisdiction.

69. In most cases, the place of central administration would be easy to determine and would point to a single jurisdiction. In the exceptional situations in which that may not be the case, the parties would be left in no worse situation than they are to begin with and would need to ensure that their interest is effective and enforceable in each jurisdiction in which the assignor might possibly be located.

Law

70. The term "law" appears in the preamble and in articles 1, paragraph 2, 7, paragraph 2, 8, 12, paragraphs 1, 5 and 6, 21, 23 to 25, 28 to 32, 36 and 42, paragraph 2. The definition of "law" is intended to ensure that reference is made to the substantive law and not to the private international law rules of the applicable law. If "law" included the private international law rules of the applicable law, any matter could be referred to a law other than the substantive law applicable by virtue of the private international law rules of the forum ("*renvoi*"). Traditionally, private international law conventions exclude any form of *renvoi*. If the designation of the applicable law were to include the private international law rules of the law applicable, an element of uncertainty would be reintroduced. For example, the private international law rules of the assignor's jurisdiction could point to the law of a State which is not party to the draft Convention and which has a rule referring priority issues to the law governing the receivable. The result would be that the parties would lose all the benefits of certainty and predictability article 24 is designed to provide.

Proceeds

71. The term "proceeds" appears in articles 12, paragraph 1, 16, paragraph 1, 24 and 26. Its definition is intended to cover both proceeds of receivables and proceeds of proceeds (e.g. if the receivable is paid by way of a cheque, the cheque is "proceeds of the receivable" and cash received by the payee of the cheque is "proceeds of proceeds"). It is also intended to cover, proceeds in cash ("payment") and proceeds in kind ("other satisfaction"), whether received in total or partial satisfaction of the assigned receivable. In particular, it is intended to cover goods received in total or partial discharge of the assigned receivable but not returned goods (e.g. because they were defective and the sales contract was cancelled or because the sales contract allowed the buyer to return the goods after a trial period). However, as between the assignor and the assignee, the assignee has a right in returned goods (see article 16, paragraph 1).

Financial contract

72. The definition is used in article 4, paragraph 2 (b). It refers to derivative contracts (e.g. swaps or repurchase agreements) that share the common characteristic of creating payment obligations determined by the price of an underlying transaction. Such contracts are called derivative because they are derived from ordinary commercial contracts and settlement is not by actual performance of the commercial (sale or deposit) contract but by the payment of a difference derived from an actual asset and an actual price. Derivatives are usually transacted within a master netting agreement (e.g. the Master Netting Agreement prepared by the International Swaps and Derivatives Association ("ISDA")).

73. In a traditional interest-rate swap, a creditworthy entity borrowing money at a fixed interest rate exchanges that interest with a variable interest rate at which a less secure entity borrows a similar sum. As a result, a less creditworthy entity, for a fee, in effect borrows money at a fixed rate. No payment of capital occurs between the parties to the swap (that comes from the underlying loan transactions). Between such parties, only interest payments take place. In practice, the interest payments are offset against each other and only a net payment is made by the party with the larger payment due. This residual payment is a contractual right to a monetary sum, the assignment of which is not excluded from the scope of the draft Convention.

74. With the exception of interest-rate swaps, most derivative contracts relate to the difference between the agreed future price of an asset on a future date and the actual market price on that date. For example, in repurchase agreements one party sells a (usually fixed-interest) investment security (e.g. stocks or bonds) to another and simultaneously agrees to repurchase the investment security at a future date at an agreed price. That price includes allowance for the interest on the cash consideration and the accrued interest on the investment security. The payments are contingent upon the delivery or return of the investment security.

75. In "forward" transactions, parties agree to buy or sell an asset (e.g. foreign currency) for delivery on a specified future date at a specified price. In a "spot" transaction, the delivery date is a certain number of business days, usually two, after the contract date. In a "futures" contract, one party agrees to deliver to the other party on a specified future date ("the maturity date") a specified asset (e.g. a commodity, currency, a debt, equity security or basket of securities, a bank deposit or any other category of property) at a price agreed at the time of the contract and payable on the maturity date. Futures are usually performed by the payment of the difference between the price agreed upon at the time of the contract and the market price on the maturity date, and not by physical delivery and payment in full on that date. In options, the buyer has the right (but not the obligation) to acquire ("call option") or to sell ("put option") an asset in the future at a price fixed when the option contract is entered into.

Netting agreement

76. Netting arrangements are common practice in inter-bank payment and securities settlement systems, derivative and foreign currency transactions. They are implemented on the basis of standard contracts and legislation prepared by the relevant industry (e.g. the Master Netting Agreement prepared by the International Swaps and Derivatives Association ("ISDA") and the ISDA Model Netting Act, adopted so far by 21 States). Such arrangements involve the net settlement of payments due in the same currency and on the same date. They also involve set off (i.e. the discharge of reciprocal claims to the extent of the smaller claim) and netting (at its simplest, the ability to set off reciprocal claims in the case of the insolvency of a counter-party).

Competing claimant

77. The term competing claimant appears in articles 9, paragraph 4, 10, 24, 26, 31, 43, paragraph 7, 45, paragraph 4, and 46, paragraph 4. The definition is intended to ensure that all potential priority conflicts are covered, including conflicts between a domestic and a foreign assignee of domestic receivables, between an assignee and a creditor with an interest in other property extended to the receivables flowing from that property and between an assignee in an assignment made before and an assignee in an assignment made after the draft Convention enters into force. A creditor with an interest in goods, which is extended to receivables by agreement or by law, is treated as an assignee. As a result, a conflict with such a creditor would be subject to a type of a rule such as article 1, 6 or 8 of the annex.

Article 6
Party autonomy

Subject to article 21, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

References

A/CN.9/432, paras. 33-38; A/CN.9/434, paras. 35-41; A/CN.9/445, paras. 191-194; A/CN.9/456, paras. 79 and 80; and A/55/17, paras. 119-121.

Commentary

78. Article 6, which is modelled on article 6 of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980 ("the United Nations Sales Convention"), provides broad recognition of the principle of party autonomy. Unlike article 6 of the United Nations Sales Convention, however, article 6 does not allow parties to vary or derogate from provisions that affect the legal position of third parties, or to exclude the draft Convention as a whole. The reason for this different approach is that, unlike the United Nations Sales Convention, the draft Convention deals mainly with the proprietary effects of an assignment and may, therefore, have an impact on the legal position of third parties. Allowing parties to an agreement to affect the rights and obligations of third parties would not only go beyond any acceptable notion of party autonomy but would also introduce an undesirable degree of uncertainty and could thus frustrate the main objectives of the draft Convention. Article 6 is intended to apply to agreements between the assignor and the assignee, between the assignor and the debtor or between the assignee and the debtor as long as they vary or derogate from provisions of the draft Convention and not of law applicable outside the draft Convention. The reference to article 21 introduces a further limitation, namely that the assignor and the debtor may not agree to waive the defences mentioned in article 21, paragraph 2 (however, waiver of defences agreed upon between the between the assignee and the debtor are not covered by article 21).

Article 7
Principles of interpretation

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

References

A/CN.9/432, paras. 76-81; A/CN.9/434, paras. 100 and 101; A/CN.9/445, paras. 199 and 200; A/CN.9/456, paras. 82-85; A/55/17, paras. 122-124; and A/CN.9/486, para. 74.

Commentary

79. Article 7, inspired by article 7 of the United Nations Sales Convention, deals with the interpretation of and the filling of gaps in the draft Convention. With regard to the interpretation of the draft Convention, article 7, paragraph 1 refers to four principles, namely, the object and purpose of the draft Convention set forth in the preamble, the international character of the text, uniformity and good faith in international trade. With the exception of the reference to the preamble which is aimed at facilitating the process of interpretation and filling gaps in the draft Convention, these principles are common to most UNCITRAL texts and should be read in the same way as similar language in those texts. The reference to the international character or source of the text is intended to assist a court in avoiding an interpretation of the draft Convention on the basis of notions of national law. The need to preserve uniformity can be served only if courts or arbitral tribunals apply the draft Convention on its merits and have regard to decisions of courts or tribunals in other countries. The Case Law on UNCITRAL Texts (CLOUT), a system of reporting case law on UNCITRAL texts, has been established by the Commission exactly with the need to preserve uniformity in mind. CLOUT is available in paper form in the six official languages of the United Nations and through the UNCITRAL home page on the World Wide Web (http://www.uncitral.org) in English, French and Spanish

(depending on the resources available, the other language versions will also be made available in the future).

80. The reference to good faith relates only to the interpretation of the draft Convention. If the principle of good faith is applied to the conduct of the parties, caution should be exercised. This principle may appropriately be applied to the contractual relationship between the assignor and the assignee or between the assignor and the debtor. However, if applied to the relationship between the assignee and the debtor or the assignee and any other claimant, it could undermine the certainty of the draft Convention. For example, according to the principle of good faith prevailing in the forum State, the debtor, who might have paid the assignee after notification, may have to pay again if the debtor knew (but had no notification) of a previous assignment. Similarly, application of the principle of good faith to the assignee-third party relationship might inadvertently result in the assignee with priority under the registration provisions of the law of the assignor's location losing priority if it knew or ought to have known of another person's rights acquired before registration (although there was no information registered about those rights).

81. As to gap-filling, a distinction is drawn between matters that fall within the scope of the draft Convention but are not expressly settled in it and matters outside the scope of the draft Convention. The latter are left to the law applicable outside the draft Convention by virtue of the private international law rules of the forum (or, if the forum is in a Contracting State, of the draft Convention). Gaps with regard to matters within the scope of the draft Convention but not expressly settled are to be filled through an application of the general principles on which the draft Convention is based.[13] Such principles are to be derived from the preamble or specific provisions of the draft Convention (e.g. the principle of facilitation of increased access to lower-cost credit and the principle of debtor protection). If there is no principle that can be applied to a particular issue, the gap is to be filled in accordance with the law applicable by virtue of private international law rules. Gaps in the private international law provisions of the draft Convention are to be filled in accordance with the private international law principles underlying the draft Convention. In the absence of such principles, such gaps should be filled in accordance with the private international law rules of the forum.

D. Chapter III
Effects of assignment

Commentary

General comments

82. Chapter III settles issues of formal and material validity of an assignment under the draft Convention (for the use of the term "effectiveness", see para. 85). Formal validity is addressed by way of a private international law rule. Material validity is addressed by way of substantive law rules. However, not all matters of material validity are addressed. Matters that are not addressed and are left to law outside the draft Convention include statutory limitations on assignment, other than those dealt with in articles 9, 11 and 12, and issues relating to priority between an assignee and a competing claimant, as well as to capacity and authority.

[13] A number of matters that are not governed by the draft Convention but are left to law applicable outside the draft Convention by virtue of private international law rules are identified in the comments to various articles (see, for example, paras. 21, 22, 24, 25, 42-54, 66, 82, 83, 85, 105 and 111).

Article 8
Form of assignment

An assignment is valid as to form if it meets the form requirements, if any form requirements exist, of either the law of the State in which the assignor is located or any other law applicable by virtue of the rules of private international law.

References

A/CN.9/420, paras. 75-79; A/CN.9/432, paras. 82-86; A/CN.9/434, paras. 102-106; A/CN.9/445, paras. 204-210; A/CN.9/456, paras. 86-92; A/CN.9/466, paras. paras. 101-103; A/55/17, paras. 125-129 and A/CN.9/486, paras. 76 and 174.

Commentary

83. The main objective of article 8 is to provide assignees the certainty that, if they meet the form requirements of a single jurisdiction, their assignments (including the contract of assignment) would be valid as to form. In order to achieve this objective, article 8 refers form to the law of the assignor's location (i.e. a single, easily determinable jurisdiction even in the case of bulk assignments or assignments of future receivables). However, article 8, does not introduce a single applicable law so as to avoid interfering with current theories as to the law applicable to the form of the contract of assignment. Whether there is any form requirement or what form means exactly (i.e. writing, notification of the debtor, registration, notarial act or payment of a stamp duty) is left to law applicable outside the draft Convention.

Article 9
Effectiveness of assignments, bulk assignments, assignments of future receivables and partial assignments

1. An assignment of one or more existing or future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee, as well as against the debtor, whether the receivables are described:

(a) Individually as receivables to which the assignment relates; or

(b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article and in articles 11 and 12, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.

4. An assignment of a receivable is not ineffective against, and the right of an assignee may not be denied priority with respect to the right of, a competing claimant, solely because law other than this Convention does not generally recognize an assignment described in paragraph 1 of this article.

References

A/CN.9/420, paras. 45-60; A/CN.9/432, paras. 93-112 and 254-258; A/CN.9/434, paras. 122 and 124-127; A/CN.9/445, paras. 211-214; A/CN.9/456, paras. 93-97; and A/55/17, paras. 130-135.

Commentary

84. Assignments of future receivables, bulk assignments and assignments of parts of or undivided interests in receivables are at the heart of significant financing practices (e.g. asset-based financing, factoring, securitization, project financing, loan syndication and participation). Yet their effectiveness as a matter of property law is not recognized in all legal systems. Article 9 is intended to validate such assignments. For reasons of consistency, article 9 validates also the assignment of a single existing receivable.

Effectiveness

85. The term "effective" is intended to reflect the proprietary effects of an assignment, the transfer of property rights in receivables. It was preferred since the term "valid" could not have that effect and, in any case, is not universally understood in the same way. The exact meaning of such effectiveness depends on whether an outright assignment or an assignment by way of security is involved. This matter is left to law applicable outside the draft Convention (see articles 5 (m) and 24, paragraph 2 (b)). In any case, if an assignment is effective, the assignee may claim and, if the debtor does not raise the absence of notification as a defence and pays, retain payment. Whether the debtor is discharged is a matter for article 19. Whether the person who received payment may retain it is a matter for article 24, since article 9 limits the effect of the assignment to the relationship between the assignor and the assignee and to the relationship between the assignee and the debtor. The reason for this approach is that effectiveness as against third parties touches upon issues of priority and the draft Convention treats such issues as distinct issues, subjecting them to the law of the assignor's location (see article 24). This means, for example, that article 9 would not validate the first assignment in time while invalidating any further assignment of the same receivables by the same assignor. It also means that application of article 9 would not result in the assignee prevailing over an insolvency administrator on the sole ground that the assignment took place before the effective date of the insolvency proceeding, even though the receivables arose or were earned after commencement of the insolvency proceeding.

86. In order to reflect this interplay between effectiveness (as a condition for priority) and priority, article 9, paragraph 1 states explicitly that it deals with effectiveness "as between the assignor and the assignee, as well as against the debtor". However, this approach may inadvertently result in leaving the effectiveness of the assignments referred to in paragraph 1 altogether to the law applicable to priority. For that reason, article 9, paragraph 4 provides that an assignment, which is effective under article 9, paragraph 1, may not be invalidated or denied priority merely because law outside the draft Convention does not recognize it as a matter of general commercial law. For the same reason, article 24 states that it does not deal with matters dealt with elsewhere in the draft Convention.

"Existing or future receivables"

87. The terms are defined in article 5 (b) by reference to the time of the conclusion of the original contract. All future receivables are to be covered, including conditional receivables and purely hypothetical receivables (see para. 59). With a view to protecting the interests of the assignor, paragraph 1 introduces an element of specificity (receivables have to be identifiable at the time they arise).

"One or more"

88. While the focus of the draft Convention is on the bulk assignment of a large volume of low-value receivables (e.g. factoring of trade receivables or securitization of consumer receivables), the assignment of single, large-value receivables (e.g. loan syndication and participation) is also covered. The rule is that, as a matter of substantive validity (formal validity is left to the law applicable under article 8), an agreement between the assignor and the assignee, as defined in article 2, is sufficient for the transfer of property rights in receivables.

"Parts of or undivided interests in receivables"

89. Monetary claims can always be divided and assigned in part. Such partial assignments are not rare in practice and there is no reason to invalidate them as long as the legitimate interests of the debtor are protected (see article 19, paragraph 6). Assignments of undivided interests are involved in significant transactions. For example, in securitization, a special purpose vehicle ("SPV") may assign to investors undivided interests in the receivables purchased from their originator as security for the SPV's obligations to investors. In loan syndication and participation, the leading lender may assign undivided interests in the loan to a number of other lenders.

"Described"

90. The term "described" is intended to establish a standard lower than the standard that would be established by the term "specified". Under this standard, a generic description of the receivable, without any specification of the identity of the debtor or the amount of the receivable, would be sufficient to encompass even future receivables (e.g. "all my receivables from my car business").

"Individually"/"in any other manner"

91. These words are intended to ensure that an assignment of existing and future receivables is effective, whether the receivables are described one by one or in any other manner that is sufficient to relate the receivables to the assignment.

Time of identification of receivables

92. Existing receivables are to be identified as receivables relating to the assignment at the time of the assignment. Future receivables should be identifiable at the time they arise (which is, by definition, after the time of the assignment). As a result of article 7, which enshrines party autonomy, the assignor and the assignee may agree on the time when future receivables should be identifiable to the assignment, as long as they do not affect the rights of the debtor and other third parties.

Master agreements

93. With a view to expediting the lending process and reducing transaction costs, paragraph 2, in effect, provides that a master agreement is sufficient to transfer rights in a pool of future receivables. If a new document were to be required each time a new receivable arose, the costs of administering a lending programme would increase considerably and the time needed to obtain properly executed documents and to review those documents would slow down the lending process to the detriment of the assignor. Under paragraph 2, a master agreement is sufficient to transfer a pool of future receivables, while, under article 10, a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment.

Statutory assignability

94. In validating the assignments to which it refers, article 9, paragraph 1 may set aside statutory prohibitions existing in national law with respect to such assignments. While setting aside such statutory limitations, the draft Convention is not intended to interfere with national policies (see para. 21). Such policies are aimed at protecting the assignor from alienating its future property and potentially depriving itself of means of subsistence (as, for example, in the case of limitations to the assignment of wage claims or retirement annuities). They are often articulated by means of a requirement for specificity, which may not be possible in the case of an assignment of future receivables or a bulk assignment. With a view to establishing a balance between the need to validate assignments and the need to protect assignors, article 9, paragraph 1 requires that the receivables be identifiable when they arise (i.e. when the original contract is concluded) as receivables to which the assignment relates. The draft Convention avoids any other limitation to the assignor's right to transfer future receivables, since it does not give priority to one creditor over another, but leaves matters of priority to national law. National policies reflected in statutory prohibitions may also be aimed at protecting the debtor (as, for

example, in the case of limitations to the assignment of sovereign or consumer receivables). The draft Convention does not interfere with such national policies either. It establishes a sufficiently high standard of debtor protection (e.g. in the case of partial assignments, the debtor may treat a notification as ineffective; see article 19, paragraph 6) and requires that the debtor be located in a Contracting State (see article 1, paragraph 3).

95. The draft Convention does not affect any statutory limitations other than those referred to in article 9, paragraph 1 (e.g. statutory limitations as to consumer receivables, sovereign receivables, wages or pensions). This result is implicit in article 11. In addition, it is explicitly addressed in article 9, paragraph 3 so as to avoid creating any ambiguity as to whether the matter is governed by the draft Convention but not explicitly settled or not governed at all (for the difference, see article 7, paragraph 2).

Article 10
Time of assignment

Without prejudice to the right of a competing claimant, an existing receivable is transferred and a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.

References

A/CN.9/420, paras. 51 and 57; A/CN.9/432, paras. 109-112 and 254-258; A/CN.9/434, paras. 107, 108 and 115-121; A/CN.9/445, paras. 221-226; A/CN.9/456, paras. 76-78 and 98-103; and A/55/17, paras. 136.-138.

Commentary

96. The rule under article 10 is that an assignment is effective, as between the assignor and the assignee, as well as against the debtor, at the time when the contract of assignment is concluded. However, article 10 is not intended to prejudice the rights of third parties and operate as a priority rule, since priority issues are left to the law of the assignor's jurisdiction. In particular, article 10 is not intended to interfere with domestic insolvency law, for example, with respect to receivables arising, becoming due or being earned after the commencement of the insolvency proceeding.

97. While this approach is obvious with regard to receivables existing at the time they are assigned, a legal fiction is created with regard to future receivables (i.e. receivables arising from contracts not in existence at the time of the assignment). In practice, the assignee would acquire rights in future receivables only if they are in fact created, but, in legal terms, the time of transfer would go back to the time of the conclusion of the contract of assignment.

98. Article 10 also recognizes and, at the same time, limits the right of the assignor and the assignee to specify the time as of which the assignment is effective. Parties may agree as to the time of a transfer but that time may not be earlier than the time of the conclusion of the contract of assignment. This approach is in line with the principle of party autonomy enshrined in article 6, since an agreement setting an earlier time of assignment could affect the order of priority between several claimants. However, neither article 6 nor article 10 precludes the parties from agreeing to antedate the coming into force of their mutual contractual obligations.

Article 11
Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

References

A/CN.9/420, paras. 61-68; A/CN.9/432, paras. 113-126; A/CN.9/434, paras. 128-137; A/CN.9/445, paras. 49-51 and 227-231; A/CN.9/447, paras. 148-152; A/CN.9/455, paras. 47-51; A/CN.9/456, paras. 104-116; A/CN.9/466, paras. 104-106; and A/55/17, paras. 139-151.

Commentary

The rule

99. Under article 11, which is inspired by article 6 of the Ottawa Convention, both the contractual limitation on assignment and the assignment are effective. The question whether there is any liability for breach of contract is left to law applicable outside the draft Convention. However, if there is any such liability, under article 11, paragraph 2, the debtor is not entitled to terminate the original contract on the sole ground that the assignor violated a contractual limitation. Furthermore, any liability of the assignor is not extended to the assignee and cannot be based solely on the assignee's knowledge of the contractual limitation (there needs to be, for example, also malicious interference with advantageous contractual relations for tortious liability to be established). Other rights that the debtor may have under law applicable outside the draft Convention such as, for example, the right to compensatory damages are not affected either. This approach is consistent with the overall objectives of the draft Convention, since the risk of the contract being avoided or the assignee being held liable for breach of a contractual limitation on assignment by the assignor could in itself have a negative impact on the cost of credit. It is also consistent with the principle that the assignment is effective even if it is made in violation of an anti-assignment clause (see articles 11, paragraph 1 and 20, paragraph 3). In addition, this approach is consistent with the principle that a modification of the original contract (which includes also contract termination), is not allowed after notification of the debtor without the consent of the assignee (see article 22, paragraph 2).

100. Article 11 is based on the assumption that the assignee should not have to examine the documentation of each receivable, since this process would be costly in a bulk assignment and impossible in an assignment of future receivables. This approach is consistent with the market economy principles and the principle against restraints on alienation of property. It also takes into account that an economy in which receivables are freely transferable yields substantial benefits to debtors. The cost savings achieved for creditors through the free transferability of their receivables can be passed along to debtors in the form of lower costs for goods and services or lower cost for credit. On balance, it is more beneficial for everyone to facilitate the assignment of receivables and to reduce transaction costs rather than to ensure that the debtor would not have to pay a person other than the original creditor. In addition, the overall

objectives of the draft Convention could not be achieved without some adjustments in national legislation that would be aimed at accommodating modern commercial practices.

Substantive and territorial scope

101. Article 11 applies to contractual limitations, whether contained in the original contract or other agreement between the assignor and the debtor or in the initial or any subsequent assignment contract. It is also intended to apply to any contractual clauses limiting the assignment of receivables (e.g. by making it subject to the debtor's consent) and not only to clauses prohibiting assignment. It does not apply to statutory limitations to assignment or to limitations relating to the assignment of rights other than receivables (e.g. confidentiality clauses). As a result, if an assignment is made in violation of a statutory limitation or a confidentiality clause, article 11 does not apply to validate such an assignment or limit any liability existing under law applicable outside the draft Convention.

102. Paragraph 3 is intended to limit the scope of application of article 11 to assignments of trade receivables. However, it is formulated in such a broad way so as to encompass a wide variety of receivables, including consumer receivables and sovereign receivables. Included are receivables arising from the sale or lease of goods and real estate, from the sale or license of intangible property, such as intellectual, industrial or other property or information, and from the supply of construction or services. In order to avoid bringing back into the scope of the draft Convention financial receivables excluded in article 4, paragraph 3 explicitly provides that it does not apply to receivables arising from financial services. Subparagraphs (c) and (d) make it clear, however, that article 11 is to apply to the assignment of certain financial-service receivables. In subparagraph (d), reference is made only to multilateral netting arrangements so as to avoid excluding the application of article 11 in the case of assignments of trade receivables just because the assignor and the debtor had a netting arrangement.

103. Article 11 applies to assignments of receivables owed by consumer debtors. It is not intended, however, to override consumer-protection legislation (although, in practice, with few exceptions, consumers do not have the bargaining power to include such limitations in their contracts: for consumer receivables and consumer protection, see paras. 36 and 132). In any case, consumers would either not even be notified of any assignment or would be notified and asked to continue paying to the same bank account or post office box. In such a case, a debtor concerned about losing rights of set-off that may arise from contracts unrelated to the original contract could discontinue its relationship with the assignee.

104. Article 11 would also apply to assignments of receivables owed by sovereign debtors. However, under article 11, the State in which the sovereign debtor is located may make a reservation as to the application of article 11. Whether an assignment is effective as against a sovereign debtor in such a case would be left to law applicable outside the draft Convention. The effectiveness of contractual limitations in assignments other than those mentioned in paragraph 3 is left to law outside the draft Convention. If that law gives effect to contractual limitations, the assignment would be invalid and the draft Convention would not apply. If that law gives no effect to such contractual limitations, the assignment could be valid and the draft Convention could apply.

Article 12
Transfer of security rights

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the

right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

References

A/CN.9/420, paras. 69-74; A/CN.9/432, paras. 127-130; A/CN.9/445, paras. 232-235; A/CN.9/434, paras. 138-147; A/CN.9/456, paras. 117-126; and A/55/17, paras. 153-154.

Commentary

Accessory and independent rights

105. Paragraph 1 reflects the generally accepted principle that accessory security rights (e.g. a suretyship, pledge or mortgage) are transferred automatically with the principal obligation, while independent security rights (e.g. an independent guarantee or a standby letter of credit) are transferable only with a new act of transfer. A general expression (i.e. "right securing payment") is used in order to ensure that rights that may not be security rights, for example, rights arising from independent guarantees and standby letters of credit, would be covered. The question of the accessory or independent character of the right and the substantive or procedural requirements to be met for the creation of such a right are left to the law governing that right. In view of the wide range of rights covered by article 12 and the divergences existing among the various legal systems in this regard, article 12 does not attempt to specify the law applicable to such rights.

106. Paragraph 1 also creates an obligation for the assignor to transfer to the assignee any independent right securing payment of the assigned receivables as well as the proceeds of such a right. As a result, if an independent right and its proceeds are assignable (by law or by agreement), the assignee will be able to obtain them. If such rights are not assignable or not assigned for any reason, the assignee will have a personal claim against the assignor. Under article 6, the assignor and the assignee may agree that a right is not transferred to the assignee. Such an agreement may reflect the lack of willingness on the part of the assignee to accept the responsibility and the cost involved in the maintenance and safekeeping of collateral (e.g.

taxation and insurance costs in the case of immovable property or storage and insurance costs in the case of equipment).

Contractual limitations

107. Paragraph 2 is intended to ensure that any limitation agreed upon between the assignor and the debtor or other person granting a security right does not invalidate the assignment of such a right. Under paragraph 3, any liability that the assignor may have for breach of contract, under law applicable outside the draft Convention, is not affected but is not extended to the assignee (this approach is consistent with the approach taken in article 11). Paragraph 4 introduces in article 12 the scope limitations of article 11, paragraph 3. The underlying policy is that, with regard to limitations on assignment, security rights should be treated in the same way as receivables, since often the value relied upon by the assignee lies in the security right and not in the receivable itself. However, a limitation included in a contract with a sovereign third-party guarantor located in a State that has made a declaration under article 40 would render the assignment ineffective but only as against the sovereign third-party guarantor.

Possessory rights

108. According to paragraph 5, if the transfer of a security right involves the transfer of possession of the collateral and such transfer causes loss or prejudice to the debtor or the person granting the right, any liability that may exist under law applicable outside the draft Convention is not affected. Paragraph 5 envisages, for example, a transfer of pledged shares that might empower a foreign assignee to exercise the rights of a shareholder to the detriment of the debtor or any other person who might have pledged the shares.

Form requirements

109. Paragraph 6 makes clear that, like the form of an assignment of receivables, the form of transfer of a security right is left to law applicable outside the draft Convention. Accordingly, a notarized document and registration may be necessary for the effective transfer of a mortgage, while delivery of possession or registration may be required for the transfer of a pledge.

E. Chapter IV
Rights, obligations and defences

1. Section I
Assignor and assignee

Commentary

Purpose of section I

110. Unlike the other provisions of the draft Convention that deal mainly with the proprietary aspects of assignment (and with the exception of article 29), the provisions contained in this section deal with contractual issues. The usefulness of these provisions lies in the fact that they recognize party autonomy, a principle enshrined in a general way in article 6, and provide default rules applicable in the absence of an agreement between the assignor and the assignee. Such default provisions offer important benefits. They reduce transaction costs by eliminating the need for parties to replicate in their contract standard terms and conditions, in particular with respect to risk allocation. They also reduce dispute resolution costs by providing a clear-cut rule for both the courts and the parties in the event the parties have not addressed a particular issue. Furthermore, they perform a useful educational function by offering a checklist of matters for parties to address at the time of the initial contract negotiations. Most significantly, they enhance uniformity and certainty by reducing the need for courts to look to national solutions offered by the law applicable to the contract. However, the role of the law applicable to the contract is not wholly eliminated in section I of chapter IV. The effect of mistake, fraud or

illegality on the validity of the contract is left to the law governing the contract, as are remedies available for breach of contract (in so far as they are not subject to the law of the forum as procedural matters).

Article 13
Rights and obligations of the assignor and the assignee

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have implicitly made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or the assignment of the particular category of receivables.

References

A/CN.9/432, paras. 131-144; A/CN.9/434, paras. 148-151; CN.9/447, paras. 17-24; ACN.9/456, paras. 127 and 128; and A/55/17, paras. 158-161 and 184.

Commentary

111. The primary purpose of article 13 is to restate in more specific terms than article 6 the principle of party autonomy. The assignor and the assignee are free to structure their mutual rights and obligations so as to meet their particular needs. They are also free to incorporate into their agreement any rules or conditions by referring to them, rather than reproducing them in their agreement. The conditions, under which the parties may exercise their freedom, and the relevant legal consequences are left to the law governing their agreement.

112. In line with article 9 of the United Nations Sales Convention, article 13 also states in paragraphs 2 and 3 a principle that is recognized in all legal systems, namely, that trade usages agreed upon and practices established by parties in their dealings are binding. Paragraph 2 draws a clear distinction between trade usages existing beyond any agreement of the parties and practices established by certain parties in their dealings. Because of their nature, trade usages are binding if they are specifically agreed upon, while trade practices are binding unless specifically otherwise agreed since they presuppose, at least, an implicit agreement. Trade usages and practices may produce rights and obligations for the assignor and the assignee. However, they cannot bind third parties, such as the debtor or creditors of the assignor. They cannot bind subsequent assignors or assignees either (however, representations that are flowing from trade usages and are given to the initial assignee may benefit subsequent assignees; see para. 116). All those parties would not necessarily be aware of usages agreed upon by, and practices established between, the initial assignor and the initial assignee.

113. Paragraph 3 defines the scope of the matters covered by an international usage. Under paragraph 3, international usages bind only the parties to international assignments. Such a limitation is not necessary in article 9 of the United Nations Sales Convention since this Convention applies only to international transactions. It is, however, necessary in article 13 in view of the fact that the draft Convention may apply to domestic assignments of international receivables. In addition, under paragraph 3, as under article 9, paragraph 2 of the United Nations Sales Convention, usages are applicable only to the particular type of assignment or to the assignment of the particular type of receivables. This means that an international factoring usage would apply to an assignment in an international factoring but not to an assignment in a securitization transaction. However, unlike article 9, paragraph 2 of the United Nations Sales Convention, paragraph 3 does not refer to the subjective, actual or constructive knowledge of the parties but only to the objective requirements that the usages must be widely known and

regularly observed. While such a reference to the subjective knowledge of the parties might be useful in a two-party relationship, it could cause uncertainty in an assignment relationship.

Article 14
Representations of the assignor

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:

(a) The assignor has the right to assign the receivable;

(b) The assignor has not previously assigned the receivable to another assignee; and

(c) The debtor does not and will not have any defences or rights of set-off.

2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.

References

A/CN.9/420, paras. 80-88; A/CN.9/432, paras. 145-158; A/CN.9/434, paras. 152-161; A/CN.9/447, paras. 25-40; A/CN.9/456, paras. 129 and 130; and A/55/17, paras. 162-163.

Commentary

Party autonomy/default rules

114. Representations made by the assignor are intended to clarify the risk allocation between the assignor and the assignee. Because of their purpose, representations constitute a significant factor in the assignee's determination of the amount of credit to be made available to the assignor and the cost of credit. For the same reason, representations are highly negotiated and explicitly settled between the assignor and the assignee. Recognizing this reality, article 14 embodies the principle of party autonomy with regard to representations of the assignor. Such representations may stem from the financing contract, the contract of assignment (if it is a separate contract) or any other contract between the assignor and the assignee. In accordance with article 13, paragraphs 2 and 3, they may also stem from trade usages and practices. Article 14 allows parties to modify the representations, whether explicitly or implicitly.

115. In addition to recognizing the principle of party autonomy, article 14 is intended to set forth a default rule allocating risks between the assignor and the assignee in the absence of an agreement of the parties as to this matter. In the allocation of risks, the overall aim of article 14 is to establish a balance between the need for fairness and the need to facilitate increased access to lower-cost credit. Article 14 is consistent with normal practice in which the assignor guarantees the existence of the assigned receivable but not the solvency of the debtor. If the parties have not agreed on representations, in the absence of a rule along the lines of article 14, the risk of non-payment would be higher. This situation could defeat a transaction (if the risk is too high) or, at least, reduce the amount of credit offered and raise the cost of credit. Furthermore, to the extent that the assignee has to bear a certain risk, the assignor's goods or services would be more expensive or even inaccessible to the debtor.

Representations as to the "existence" or assignability of a receivable

116. Under paragraph 1, the assignor represents that it has the right to assign the receivable, that it has not assigned it already and that the debtor does and will not have any defences. In view of the need for the assignee to be able to estimate the risk involved in a transaction before extending credit, paragraph 1 provides that representations have to be made, and take effect, at the time of the conclusion of the contract of assignment. With respect to future receivables, representations are deemed to be made at the time of the assignment and take effect as of that

time if they actually arise. Such representations are considered as being given not only to the immediate assignee but also to any subsequent assignee. As a result, any subsequent assignee may turn against the assignor for breach of representations. If representations were considered as being undertaken only as against the immediate assignee, any subsequent assignee would have recourse only against its immediate assignor, a process that would increase the risk and thus the cost of transactions involving subsequent assignments.

117. The assignor is in violation of the representation as to its right to assign, introduced in subparagraph (a), if it does not have the capacity or the authority to act, or if there is any statutory limitation on assignment. This result is justified by the fact that the assignor is in a better position to know whether it has the right to assign. However, the assignor is not liable towards the assignee for breach of representations if the original contract between the assignor and the debtor contains a limitation on assignment. Subparagraph (a) contains no explicit reference to that rule, since it is implicit in article 11, under which the assignment is effective even if it is in breach of an agreement limiting assignment (see also article 20, paragraph 3). The representation, contained in subparagraph (b), that the assignor has not already assigned the receivable is aimed at holding the assignor accountable to the assignee if, as a result of a previous assignment by the assignor, the assignee does not have priority. This result may occur if the assignee has no objective way of determining whether a previous assignment has occurred. Subparagraph (b), however, does not require the assignor to represent that it will not assign the receivables to another assignee after the first assignment. Such a representation would run counter to modern financing practice in which the right of the assignor to offer to different lenders parts of or an undivided interest in the same receivables as security for obtaining credit is essential.

118. Subparagraph (c) places on the assignor the risk of hidden defences or rights of set-off of the debtor that may defeat in whole or in part the assignee's claim. This provision is premised on the assumption that, by performing its contract with the debtor properly, the assignor will be able to preclude such defences from arising. In particular in the context of sales contracts with service and maintenance elements, such an approach would result in a greater degree of accountability of the assignor for performing properly its contract with the debtor. The provision is also based on the assumption that, in any case, the assignor will be in a better position to know whether the contract will be properly performed, even if the assignor is just the seller of goods manufactured by a third person. However, there is no need for the assignor to have actual knowledge of any defences. Furthermore, subparagraph (c) is premised on the assumption that placing on the assignor the risk of hidden defences normally has a beneficial impact on the cost of credit. Subparagraph (c) has a wide scope, encompassing defences and rights of set-off whether they have a contractual or non-contractual source and whether they relate to existing or to future receivables. It also covers rights of set-off, whether they arise from the original or any related contract or from contracts unrelated to the original contract, with the exception of rights of set-off from unrelated contracts that become available after notification (see article 20, paragraph 2). With regard to representations relating to the absence of defences against future receivables assigned in bulk by way of security, the representation contained in subparagraph (c) properly reflects current practice. According to such practice, assignors normally receive credit only in the amount of those receivables that are not likely to be subject to defences, while they have to take back the receivables that were not paid by the debtor ("recourse financing").

Representations as to the solvency of the debtor

119. Paragraph 2 reflects the generally accepted principle that the assignor does not guarantee the solvency of the debtor. As a result, the risk of debtor default is on the assignee, a fact that the assignee takes into account in determining whether to extend credit and on what conditions. Recognizing the right of the parties to financing transactions to agree on a different risk allocation, paragraph 2 allows the assignor and the assignee to agree otherwise. Such an agreement may be implicit or explicit. The question of what constitutes an implicit agreement is left to the applicable contract interpretation rules.

Breach of representations

120. The draft Convention contains no specific rules on breach of representations since matters relating to the underlying contract are beyond the scope of the draft Convention.

Article 15
Right to notify the debtor

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and payment instructions, but after notification has been sent only the assignee may send such an instruction.

2. Notification of the assignment or payment instructions sent in breach of any agreement referred to in paragraph 1 of this article are not ineffective for the purposes of article 19 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

References

A/CN.9/420, paras. 89-94 and 119-122; A/CN.9/432, paras. 159-164 and 175; A/CN.9/434, paras. 162-165; A/CN.9/447, paras. 41-47; A/CN.9/456, paras. 131-144 and 193; A/CN.9/466, paras. 116 and 117; and A/55/17, paras. 164-165.

Commentary

Independent right of the assignee to notify the debtor and to request payment

121. The main objective of article 15 is to recognize the right of the assignee to notify the debtor and to request payment, even without the co-operation or the authorization of the assignor. It is not intended to define notification (see article 5 (d)) or to address the conditions for a notification to be effective as against the debtor (see article 18) or the legal consequences of notification (see articles 19, 20 and 22). Granting the assignee an autonomous right to notify the debtor is considered important, in particular since the assignor might be unwilling or, in the case of insolvency, unable to cooperate with the assignee. Allowing the assignee to notify the debtor independently of the assignor would not give an undue preference to the assignee in the case of insolvency of the assignor. That matter is left to the law governing priority. If, under that law, priority is based on the time of notification, an assignee cannot obtain priority over the creditors of the assignor or the insolvency administrator. In such a case, priority is obtained only if notification takes place before the commencement of an insolvency proceeding and on the condition that the assignment does not constitute a fraudulent or preferential transfer.

122. Article 15 is in particular intended to recognize practices in which it is normal for the assignor to send a bill to the debtor requesting payment and notifying the debtor about the assignment (e.g. factoring). At the same time, article 15 does not ignore non-notification practices (see para. 123). The protection of the debtor against the risk of being notified and being asked to pay by a potentially unknown person is a distinct matter, which is addressed by allowing the debtor in the case of notification by the assignee to request adequate proof (see article 19, paragraph 7).

Notification as a right, not an obligation

123. With a view to accommodating non-notification practices, notification is formulated in paragraph 1 as a right and not as an obligation. In such practices, in order to avoid any inconvenience to the debtor that might result in an interruption to the normal flow of payments, no notification at all is given (e.g. undisclosed invoice discounting or securitization). If the debtor is notified, so as not to accumulate rights of set-off from unrelated contracts (see article 20, paragraph 2), the debtor is instructed to continue paying the assignor, unless a default-like situation arises in which different payment instructions are given normally.

Notification and payment instruction

124. In line with the approach followed in article 5 (d) (which defines notification without any reference to a payment instruction), paragraph 1 draws a clear distinction between a notification and a payment instruction. This approach is intended to recognize the difference, both in purpose and in time, between a notification and a payment instruction. It is also intended to validate practices in which notification is given without any payment instructions (e.g. to cut off the debtor's rights of set-off arising from contracts unrelated to the original contract). Under paragraph 1, before notification, a payment instruction may be sent either by the assignor or by the assignee and, after notification, only by the assignee. Unlike article 19, paragraph 1, refers to the time notification is "sent" (not "received") because neither the assignor nor the assignee has a way to assess the time of receipt. In any case, that time is not important for the determination of who has the right to give a payment instruction as between the assignor and the assignee.

Agreements as to notification

125. While paragraph 1 grants the assignee an autonomous right to notify the debtor and to request payment, it also recognizes the right of the assignor and the assignee to negotiate and agree on the matter of notification of the debtor so as to meet their particular needs. For example, the assignor and the assignee may agree that no notification would be given to the debtor as long as the flow of payments is not interrupted. In order to ensure that there is no need for a specific agreement, the opening words of paragraph 1 are formulated in a negative way ("unless otherwise agreed").

126. The purpose of the rule introduced in paragraph 2 is that, if notification or a payment instruction is given in violation of such an agreement and the debtor pays, the debtor is discharged. The underlying rationale is that the debtor should be able to discharge its obligation as directed and should not concern itself with the private arrangements between the assignor and the assignee. Whether the person violating such an agreement is liable for breach of contract under law applicable outside the draft Convention is a separate matter and should not affect the discharge of the debtor, who is not a party to that agreement. A notification given in violation of an agreement between the assignor and the assignee, however, does not cut off any rights of set-off of the debtor from contracts unrelated to the original contract (see article 20). Such a notification does not trigger a change in the way the assignor and the debtor may amend the original contract (see article 22) or create a basis for the determination of priority under the law applicable to priority issues either (see articles 24-26). The reason for this approach is that the assignee who wrongfully notified the debtor should not be given an undue advantage. The double negative formulation in paragraph 2 ("is not ineffective") is intended to ensure that the mere violation of an agreement neither invalidates the notification for the purpose of debtor discharge, nor interferes with contract law as to the conditions required for such an agreement to be effective.

Article 16
Right to payment

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.

2. The assignee may not retain more than the value of its right in the receivable.

References

A/CN.9/447, paras. 48-68; A/CN.9/456, paras. 145-159; A/CN.9/466, paras. 118-123; and A/55/17, paras. 166-167.

Commentary

Objective and scope

127. Article 16 is intended to state explicitly what is already implicit in articles 2 and 9, namely, that, as between the assignor and the assignee, the assignee has a proprietary right in the assigned receivable and in any proceeds arising from the receivables. As the scope of article 16 is limited to the relationship between the assignor and the assignee, it is subject to the general principle of party autonomy embodied in article 6 and is intended to operate as a default rule. It is not intended to affect the debtor's legal position or issues of priority.

Rights in proceeds and returned goods

128. As between the assignor and the assignee, the assignee's right extends to proceeds (which, under article 5 (j), includes whatever is received in respect of a receivable and its proceeds). It also extends to goods returned as defective or after the expiry of a trial period. Unlike in a priority contest under article 24, where the assignee's right in proceeds does not extend to returned goods, in this context, there is no reason to limit the ability of the assignor and the assignee to agree that the assignee could claim any returned goods. This result is also justified by the fact that, even in the absence of an agreement, a default rule allowing the assignee to claim any returned goods could reduce the risks of non-collection from the debtor and thus have a positive impact on the cost of credit. Paragraph 1 covers situations in which payment has been made to the assignee, the assignor or another person. In the last case, the assignee's right is, under paragraph 1 (c), subject to priority.

129. Paragraph 2 reflects normal practice in assignments by way of security. In such assignments, the assignee may have the right to collect the full amount of the receivable owed, plus interest owed on the ground of contract or law, but has to account for and return to the assignor any balance remaining after payment of the assignee's claim. Paragraph 2 does not repeat the reference to a contrary agreement of the parties, since it is included in the chapeau of paragraph 1 and the assignee's right in the assigned receivable flows from the assignment contract and is, under article 13, subject to party autonomy anyway.

Notification of the debtor

130. The assignee's right in proceeds is independent of any notification of the assignment (the nature of such a right is left to the law of the assignor's location; see article 24, paragraph 1 (a) (ii), (b) and (c)). The reason for this approach is the need to ensure that, if payment is made to the assignee even before notification, the assignee may retain the proceeds of payment. This approach is also justified by the need to ensure that, if payment is made to the assignor after notification, the assignee would have a choice between claiming payment from the assignor, under article 16, paragraph 1 (b), or from the debtor, under article 19, paragraph 2. This result is appropriate. The debtor, who pays the assignor after notification, takes the risk of having to pay twice and of not being able to recover from the assignor if the assignor becomes insolvent (in practice, the assignee would not claim a second payment from the debtor, unless the assignor had become insolvent).

2. Section II
Debtor

Article 17
Principle of debtor protection

1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

(a) Change the currency of payment specified in the original contract; or

(b) Change the State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.

References

A/CN.9/420, para. 101; A/CN.9/432, paras. 33-38, 89, 90, 206 and 244; A/CN.9/434, paras. 86-95; A/CN.9/445, paras. 195-198; A/CN.9/456, paras. 21, 81 and 168-176; and A/55/17, paras. 168-173.

Commentary

Principle of debtor protection

131. The principle of debtor protection is one of the main general principles of the draft Convention. It is referred to in a general manner in the preamble and in article 17. Furthermore, it is reflected in a number of provisions of the draft Convention (e.g. articles 1, paragraph 3, 6, 19-23, 29 and 40). The thrust of the rule set forth in paragraph 1 is that there are no implied effects of the draft Convention on the legal position of the debtor (any doubt as to whether an assignment changes the debtor's legal position should be resolved in favour of the debtor). The draft Convention is, in particular, not designed to change the payment terms stipulated in the original contract (e.g. the amount owed, whether for principal or interest; the date payment is due; and any conditions precedent to the debtor's obligation to pay). The draft Convention is not intended to change the defences or rights of set-off that the debtor may raise under the original contract or to increase expenses in connection with payment either. Such changes may, however, be effected with the consent of the debtor (see, however, para. 132).

Consumer protection

132. A particular principle flowing from article 17 is that the draft Convention is not intended to have an adverse effect on the rights of consumer debtors and, in particular, to override consumer-protection legislation, which normally reflects public policy or mandatory law considerations. This principle is also reflected in a number of provisions of the draft Convention, as, for example, in articles 21, paragraph 1 and 23 (see also paras. 36 and 103).

Country and currency risk

133. Whatever change is effected in the debtor's legal position as a result of an assignment under the draft Convention, under paragraph 2, a payment instruction, whether given with the notification or subsequently, may not change the currency of payment. It may not change the country of payment either, unless the change is beneficial to the debtor and results in payment being allowed in the country in which the debtor is located. Such a change of the country of payment is often allowed in factoring transactions so as to facilitate payment by debtors. Paragraph 2 refers to the currency or the country of payment "specified" in the original contract. Such specification may be explicit or implicit.